156-537

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 142.

N. L. ARD, PLAINTIFF IN ERROR,

vs.

C. H. PRATT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED APRIL 27, 1891.

(14,600.)

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1 In the Supreme Court of the State of Kansas.

N. L. ARD, Plaintiff in Error,
vs.
C. H. PRATT, Defendant in Error.

Be it remembered that on the 20th day of August, 1889, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition in error, with case made attached thereto as a part thereof, from the district court of Allen county, which is in words and figures as follows, to wit:

2 In the Supreme Court of the State of Kansas.

N. L. ARD, Plaintiff in Error,
vs.
C. H. *BRATT*, Defendant in Error. } No. 6129.

Petition in Error.

The said N. L. Ard, plaintiff in error, complains of said defendant in error, for that the said C. H. Pratt, at the June, 1889, term of the district court of Allen county, State of Kansas, recovered a judgment by the consideration of said court against the said N. L. Ard in a certain action then pending in the said court, wherein the said C. H. Pratt was plaintiff and the said N. L. Ard *et al.* were defendants.

The original case made, duly certified and attested, is hereunto attached, marked "Exhibit A," and made a part of this petition in error.

And the said N. L. Ard avers that there is error in said record and proceedings, in this, to wit:

1. Said court erred in overruling motion of plaintiff in error for a new trial.

2. Said court erred in admitting evidence on the part of defendant in error.

3. Said court erred in refusing and ruling out competent and legal evidence on the part of the plaintiff in error.

4. That said judgment was rendered by said district court in favor of the defendant in error when, according to law and evidence, it ought to have been rendered in favor of this plaintiff in error.

5. Said court erred in admitting as evidence in favor of the defendant in error the pretended patent from the United States of America to the Missouri, Kansas and Texas Railway Company.

6. There are other errors prejudicial to the plaintiff in error manifest upon the face of the record.

Wherefore the plaintiff in error prays that said judgment so rendered may be reversed, set aside, and held for naught, and that a judgment may be ordered to be rendered in favor of the plaintiff in error and against the defendant in error, and that the plaintiff

in error be restored to all rights he has lost by the rendition of such judgment, and for such further relief as to the court may seem just.

N. L. ARD, *Plaintiff in Error.*
By BENTON, SCOTT & CAMPBELL,
His Attorneys.

Filed Aug. 20, 1889.

C. J. BROWN,
Clerk Sup. Court.

3 EXHIBIT "A."

In the District Court of Allen County, Kansas.

C. H. PRATT, Plaintiff,
vs.
N. L. ARD, THOMAS MALEY, FRED. NELSON, DANIEL DIAMOND, Samuel Stanley, Charles Troxel, John Mills, C. K. Mills, P. Ahlstrom, Charles Johnson, Peter Pearson, O. Pearson, M. Gabo, B. L. Wallace, Wm. Tramel, Defendants.

Be it remembered that heretofore, to wit, on the 28th day of January, 1886, said plaintiff commenced his action against said defendants by filing in the district court of Allen county, of that date, his petition, which is in words and figures following:

In the District Court of Allen County, Kansas.

C. H. PRATT
vs.
N. L. ARD, THOMAS MALEY, FRED. NELSON, DANIEL DIAMOND, Samuel Stanley, Charles Troxel, John Mills, C. K. Mills, P. Ahlstrom, Charles Johnson, Peter Pearson, O. Pearson, M. Gabo, B. L. Wallace, Wm. Tramle.

Petition.

For a first cause of action plaintiff says that he is the owner and entitled to the immediate possession of and has both legal and equitable title to the following-described real estate, situated in Allen county, Kansas, viz: The S. E. ¼ of sec. 12, township 26, range 19; the N. W. ¼ of sec. 18, T. 26, R. 20; the W. ½ N. E. ¼ sec. 18, T. 26, R. 20; W. ½ of S. E. ¼ sec. 2, T. 26, R. 20; the N. E. ¼ of N. E. ¼ sec 34, T. 25, R. 20; W. ½ of N. E. ¼ sec. 34, T. 25, R. 20; E. ½ of N. W. ¼ sec. 34, T. 25, R. 20; the N. W. ¼ sec 8, T. 24, R. 20; the S. W. ¼ of sec. 8, T. 24, R. 20; the W. ½ of S. E. ¼ sec. 18, T. 26, R. 21; the S. W. ¼ of sec. 18, T. 26, R. 21; the N. W. ¼ sec. 20, T. 26, R. 21; the N. E. ¼ sec. 20, T. 26, R. 21; the W. ½ S. E. ¼ sec. 2, T. 25, R. 19; the W. ½ S. E. ¼ sec. 10, T. 25, R. 19; the N. ½ S. W. ¼ sec. 2, T. 26, R. 20; the N. E. ¼ S. E. ¼ sec. 10, T. 26, R. 20; the S. E. ¼ N. E. ¼ sec. 10, T. 26, R. 20. Plaintiff further says that defendants wrongfully and unlawfully detain and withhold said property from him.

And for a second cause of action against said defendants plaintiff says that for three years last past defendants have wrongfully and unlawfully withheld possession of the real property described in the foregoing cause of action, and that he has been thereby damaged in the sum of five thousand dollars.

Wherefore plaintiff prays judgment for recovery of said lands and for said $5,000.00, his damages sustained as aforesaid.

L. W. KEPLINGER,
Attorney for Plaintiff.

On the back of said petition appears the following endorsement, to wit:

"C. H. Pratt *vs.* Thomas Maley *et al.* Petition. Precipe. Clerk: Please issue summons for each of within defendants, returnable according to law. L. W. Keplinger, att'y for pl'ffs. Filed Jan. 28, 1886. M. P. Jacoby, district clerk. We bind ourselves as surety for all costs for which plaintiff may become liable in the within action. C. H. Pratt, E. A. Barber."

And afterwards, to wit, on the 29th day of March, 1886, said defendant, N. L. Ard, filed his answer to said petition, which is in words and figures following:

"In the District Court of Allen County, State of Kansas.

C. H. PRATT, Pl'ff,
vs.
THOMAS MALEY, FRED. NELSON, DANIEL DIAMOND, N. L. ARD, Samuel Stanley, Charles Troxel, John Mills, C. K. Mills, P. Ahlstrom, Charles Johnson, Peter Pearson, O. Pearson, M. Gabo, B. F. Wallace, and William Tramle, Def'ts.

Answer.

Comes now N. L. Ard, one of the above defendants, by Knight & Foust, his attorneys, and, for his separate answer to the petition of the plaintiff herein filed, says:

1st. That he admits that he is in the possession of the west half of the southeast quarter of section 2, twp. 26, range 20, Allen county, Kansas, described in said petition, but avers that he is the legal and equitable owner thereof, and denies each and every material allegation in plaintiff's petition, so far as said described land is concerned, except as herein admitted.

2nd. Further answering plaintiff, says that he disclaims all or any right, title, or interest or possession or right of possession to any o- the other lands claimed in plaintiff's petition, except the land described in first paragraph of this answer, and asks that this action be dismissed as to him as to all the other lands and damages claimed for detention of such lands, with costs.

KNIGHT & FOUST,
Attorneys for N. L. Ard."

On the back of said answer appears the following endorsement, to wit:

"C. H. Pratt, pl'ff, *vs.* Thomas Maley *et al.*, def'ts. Answers of N. L. Ard. Filed Mar. 29, 1886. M. P. Jacoby, clerk."

The issue*d* having been fully joined, this case came on for trial on the 21st day of June, 1888, it being the June, 1888, term of said court; whereupon, a jury being waived, said cause was submitted to the court for trial without a jury.

The plaintiff thereupon offered in evidence a copy of the patent for the land in controversy; which copy is recorded, at page 595 in Book "K," in the office of the register of deeds for Allen county, Kansas. A copy of said patent is in words and figures as follows, to wit:

"UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

Whereas by the act of Congress approved July 26, 1866, entitled 'An act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific railway and telegraph from Ft. Riley, Kansas, to Ft. Smith, Arkansas,' authority is given to the Union Pacific Railway Company, Southern branch, now known as the Missouri, Kansas and Texas Railway Company of Kansas, a corporation existing under the laws of said State of Kansas, to construct a railroad and telegraph line under certain conditions and stipulations, as expressed in said act, and provision is made for granting to the State of Kansas, for the use and benefit of said railroad, every alternate section of land or parts thereof designated by odd numbers to the extent of five alternate
5 sections per mile on each side of said road and not exceeding in all ten sections per mile; and

Whereas it is further enacted that in case it shall appear that the United States have, when the line of said road is definitely located, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, then so much land is set apart to be selected for the purpose aforesaid nearest to the section above specified: Provided, that said lands hereby granted as indemnity shall not be selected beyond twenty miles from the line of said road; and

Whereas it is further enacted by the 3rd section of the aforesaid act that 'When the governor of the State of Kansas shall certify that any section of *the of the* (ten)* consecutive miles of said railroad is completed in a good, substantial, and workmanlike manner as a first-class railroad, patents will issue to said company for the lands thereby granted;' and

Whereas is is indicated by letter of the Secretary of the Interior to the Commissioner of the General Land Office, dated July 25, 1870, and map therewith, duly certified by the governor of the State of Kansas, that the Missouri, Kansas and Texas Railway Company

* In pencil in copy.

has fully completed and equipped, as required by the act, the said railroad from Junction City to the southern boundary of the State of Kansas; and

Whereas certain tracts have been selected under the act aforesaid by Isaac T. Goodnow, land commissioner of the Missouri, Kansas and Texas Railway Company, as shown by his original lists of selections, dated August 10th, 1872, and certified under date of April 14th, 1873, by the register and receiver at Independence, Kansas, the said tracts being described as follows, to wit:

* * * * * * *

South of the base line and east of the sixth principal meridian, Kansas, twenty-mile limits, Independence district, * * * (among other tracts) all the southeast quarter (¼) of section two (2), township twenty-six (26), range twenty (20), in Allen county, Kansas. * * *

Now know ye that the United States of America, in consideration of the premises and pursuant to the said act of Congress, have given and granted, and by these presents do give and grant, unto the said Missouri, Kansas and Texas Railway Company of Kansas and its assigns the tracts of land selected as aforesaid and described in the foregoing, yet excluding all mineral lands, should any such be found to exist on the tracts aforesaid; to have and to hold the said tracts, with the appurtenances thereof, unto the said Missouri, Kansas and Texas Railway Company of Kansas and its assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, this third day of November, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-eighth.

By the President:

U. S. GRANT,
By S. D. WILLIAMSON, *Secretary.*

S. D. LIPPENCOTT,
Receiver of the General Land Office.

Filed November 21, 1873.

J. S. FAST,
Register of Deeds."

6 Defendant makes no objection on ground that the copy is not best evidence, but objects that it is incompetent, irrelevant, and immaterial, void, conveys no title, and in derogation of act of Congress; which objection the court overrules; to which the defendant then and there excepted and still excepts.

It is agreed in open court by and between the parties to this action that whatever title to the land in controversy passed by the above and foregoing patent to the railway company is in the defendant by virtue of deeds from the railway company to him.

The plaintiff then offered in evidence Exhibit "A;" to which defendant objects as being incompetent, irrelevant, and immaterial. Said Exhibit "A" is in words and figures following, to wit:

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June 1st*, 1888.

I, S. M. Stockslager, Commissioner of the General Land Office, do hereby certify that the annexed are true and literal exemplifications of the following letters, to wit, office letter, Nov. 19, 1877, to the register and receiver at Independence, Kansas, relative to the claim of Newton L. Ard to the W. ½ S. E. ¼, sec. 2, t'p 26 S., R. 20 E., Kansas; letter to the Secretary of the Interior, June 24, 1878, transmitting the papers in the case on appeal; letter from the Secretary, Nov. 5, 1878, affirming the action of this office; office letter of Nov. 8, 1878, to the district officers, transmitting a copy of the Secretary's decision, as shown by the records and files of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

S. M. STOCKSLAGER,
[SEAL.] *Commissioner of the General Land Office.*"

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Nov. 19th*, 1877.

Register and receiver, Independence, Kansas.

GENTLEMEN: I have considered the case of Newton L. Ard *vs.* The Missouri, Kansas and Texas Railway Company, the record in which case was received with the register's letter of Feb'y 24th, 1874. The tract involved is the W. ½ of S. E. ¼, 2, 26 S., 20 E. The said tract is within the 20-mile limits of the grant for the Missouri, Kansas and Texas Railway Company, the right of which attached Dec'r 3, 1866. It was patented to said company Nov. 3, 1873. The records show that Newton Ard filed D. S. 2115 July 14, 1866, claiming settlement the same day on the tract named. It appears that upon the application of Ard for the land a hearing was ordered by the local officers, and the case set for September 9, 1872, when it was heard, both parties appearing. As before stated, the testimony was not transmitted to this office until February 24, 1874, and the land having in the mean time been patented to the company, the case has been held to the present time without formal decision.

The land was "offered" Dec'r 3, 1860. At the hearing Mr.
7 Ard, the claimant, testified that his first improvement on the tract was about the 20th of June, 1866, when he broke two acres; that about the first of July, 1866, he broke hedge rows on three sides of the land and in the fall rebroke the two acres; hauled rails in the winter and spring of 1867 to enclose four acres. In spring of 1867 built a rail pen on the land, but had up to that time no house on it; lived a half mile west of his claim, but sleeping on

his claim once in a while by a pile of rails; that he continued to improve the land and at date of trial had thereon a house, stable, and other improvements. The only other witness, Mr. Ard's brother, simply corroborates his statements. It does not appear just when Mr. Ard first had a dwelling-house or took up his actual residence on the land. It is clear, however, that he did not within the time prescribed by the pre-emption law make proof and payment, nor does it appear that he attempted to do so. I am of opinion that from his own admissions Mr. Ard did not at the date the right of the road attached have such a valid subsisting claim as would have been capable of being perfected into complete title or would have excepted the land from the grant to the company. Mr. Ard's application to make proof and payment is therefore rejected and the title of the company under its patent will not be disturbed. Notify all parties in interest of this decision; allow the usual sixty days for appeal and make prompt report.

Very respectfully,

(Signed) J. A. WILLIAMSON,
Commissioner."

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June* 24, 1878.

Hon. Carl Schurz, Secretary of the Interior.

SIR: I have the honor to submit for your consideration papers on appeal from my decision of November 19th, 1877, adverse to plaintiff in the case of Newton L. Ard *vs.* The Missouri, Kansas & Texas Railway Company, involving the W. ½ of S. E. ¼, section 2, township 26, range 20, Independence, Kansas. The papers submitted are as follows: A, proceedings before local officers, with their joint opinion thereon; B, copy of Commissioner's decision; C, appeal therefrom.

Very respectfully, J. A. WILLIAMSON,
Commissioner."

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, *Nov. 5th*, 1878.

SIR: I have considered the appeal from your decisions of November 19th, 1877, in the case of Newton L. Ard *vs.* The Missouri, Kansas and Texas Railway Company, involving the W. ½ S. E. ¼, section 2, t'p 26, range 20 E., Independence, Kansas. The tract is within the twenty-mile limits of the grant for said company, the right of which attached Dec. 3rd, 1866. It was patented to the company November 3, 1873, and was 'offered' December 3, 1860. The record shows that Ard filed declaratory statement 2115 July 14, 1866, on the tract named, claiming settlement on the same day. He applied to make proof and settlement August 9th, 1872, and a hearing was held September 9th, 1872. The testimony shows that on
8 June 20th, 1866, he broke two acres. In July following he broke he*l*ge rows on three sides of the land, and in the same

fall rebroke the two acres. In the winter and spring of 1867 he hauled rails to enclose four acres, and in the same spring built a rail fence. At this date he had not erected a house on the tract, but lived a half mile distant therefrom. Between June 20th and December 1, 1866, he slept 'once in a while' on the tract 'by a pile of rails.' It does not appear when he built a house and became resident thereon; but at the date of hearing he had a house and other outbuildings and about seventy-five acres under fence and cultivation. You decided that the existence of a legal pre-emption at the date of the attachment of the grant was not established, and rejected the application to enter. In the case of Moore *vs.* Robbins (6 Otto, p. 530), it was held that when a patent, 'issued under the seal of the United States and signed by the President, is delivered to and accepted by the party, the title of the Government passes with this delivery. With the title passes away all authority or control of the executive department over the title which it has conveyed. * * * If fraud, mistake, error, or wrong has been done, the courts of justice present the only remedy.' As the testimony is conflicting and your decision upon the facts not being clearly against the evidence, and as, under the foregoing citation from the highest judicial authority, the issue of patent has apparently excluded the case from review for the purpose of giving a patent to the appellant, I decline to further consider the appeal, and your decision will be allowed to stand, so far as regards the Land Department.

I return the papers transmitted with your letter of June 24, 1878.

Very respectfully, C. SCHURZ, *Secretary.*

The Commissioner of the General Land Office."

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Nov. 8th*, 1878.

Register and receiver, Independence, Kansas.

GENTLEMEN: I enclose for your information a copy of the decisions of the Honorable Secretary of the Interior, dated 5th instant, in the case of Newton L. Ard *vs.* The Missouri, Kansas and Texas Railway Company, involving the W. ½ S. E. ¼, 2, 26 S. 20 E., on the appeal filed from my decision of November 19th, 1877, adverse to Mr. Ard. In accordance with the Secretary's decision, my decision has been made final and the case closed. You will so advise all parties in interest.

Very respectfully,
(Signed) J. A. WILLIAMSON,
Commissioner."

To all of which evidence the defendant then and there objected as being incompetent, irrelevant, and immaterial; which objections were by the court overruled; to which ruling the defendant then and there duly excepted and still excepts.

Plaintiff then offered in evidence Exhibit "B;" to which the defendant objects as incompetent, irrelevant, and immaterial.

Said Exhibit "B" is in words and figures following:

9 "DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June 1st*, 1888.

I, S. M. Stockslager, Commissioner of the General Land Office, do hereby certify that the annexed are true and literal exemplifications of the following-described letters, as shown by the records and files of this office, to wit:

Letter from M. H. Donoho, dated at Humboldt, Kansas, Aug. 2, 1879; letter to Hon. Carl Schurz, Secretary of the Interior, dated Sept. 17, 1879; letter from A. Bell, acting Secretary, dated Sept. 20, 1879; office letter to the register and receiver, dated Oct. 15, 1879.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

S. M. STOCKSLAGER,
[SEAL.] *Commissioner of General Land Office.*"

"HUMBOLDT, KANSAS, *Aug. 2nd*, 1879.

Hon. Commissioner Gen. Land Office:

In the case of Newton L. Ard *vs.* M., K. & T. R. R. Co., involving the right to the W. ½ S. E. ¼, 2, 26 S., 20 E., Independence, Kansas, which was decided against Newton L. Ard, as shown by letter from General Land Office dated November 19, 1877, we think the case was not properly presented to the department and we would ask for a new hearing upon the following grounds, to wit: Newton L. Ard filed his D. S. 2115 July 14, 1866; he was a single man at that time and over the age of 21 years, and a native-born citizen of the United States. Prior to the time that he filed his D. S. he had commenced cultivating and improving the land, and at the time of making his filing he had 20 acres broke and various other improvements. After making his filing, but before the time had expired for making proof and payment for the land, he was notified that the land had been withdrawn for the use and benefit of the M., K. & T. R. R. Owing to this fact he did not make proof and payment within the year. We think this is a lawful and valid excuse for his failure to comply with the law. Also, Mr. Ard was on the land making improvements and had a valid settlement long before the R. R. Co. received their grant. We think this fact ought to entitle him to a new hearing. Furthermore, Mr. Ard has continued to reside upon the land and to improve it from the time of making filing up to the present time, and now has valuable improvements upon the same, all of which we are prepared to show if allowed to have a new hearing. If there has ever been any patent issued on above-described land it has never been recorded in the proper county nor

received at the local land office. Feeling assured that Mr. Ard has a just and equitable case and believing that his is a great hardship, which ought not to be visited upon an honest and worthy man, whose title all is at stake, I respectfully submit to and ask that he be permitted to make another application and have his case once more reviewed.

Respectfully, M. H. DONOHO,
Humboldt, Kansas."

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10 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Sept. 17th*, 1879.

Hon. Carl Schurz, Secretary of the Interior.

SIR: I have the honor to submit for your consideration the application for a new hearing in the case of Newton L. Ard *vs.* The M., K. & T. R'y Co., involving the title to the W. ½, S. E. ¼, sec. 2, t'p 26 S., R., 20 E. In your decision of November 5, 1878, the action of this office of November 19, 1877, rejecting his application to make proof and payment was affirmed, and on November 8, 1878, the case was formally closed.

Very respectfully, J. M. ARMSTRONG,
Acting Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *September* 20, 1879.

SIR: I have considered the application of M. H. Donoho, dated Humboldt, Kansas, August 2, 1879, received with your letter of 17th instant, for a review of the case of Newton L. Ard *vs.* The Missouri, Kansas and Texas Railway Company, decided November 5th, 1878, in affirmation of your decision of November 19, 1877. The tract involved is the W. ½ of S. E. ¼ section 2, town. 26 S., range 20 E., which, as recited in the former decision, was patented to the company November 3, 1873, on which account further jurisdiction of the appeal was expressly waived by the department. The only ground for the present application is the allegation that, in the opinion of Mr. Donoho, the case was not in the first instance properly presented to the department, accompanied by an offer to show certain facts respecting the original settlement of Mr. Ard which were not clearly put in evidence on the former trial. The application is insufficient without reference to the question of jurisdiction, considering which, and the fact that the case has passed beyond the control of executive action, I must decline to reopen it for the purpose of a rehearing. The application is herewith returned.

Very respectfully, A. BELL,
Acting Secretary.

Hon. J. M. Armstrong, acting Com'r of the General Land Office.

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Oct. 15th*, 1879.

Register and receiver, Independence, Kansas.

GENTLEMEN: Referring to the application of M. H. Donoho, of Humboldt, Kansas, of the 2nd of August last, for a rehearing in the case of Newton L. Ard *vs.* The Missouri, Kansas and Texas Railroad Company, involving the W. ½ of S. E. ¼ sec. 2, T. 26, R. 20 E, which was decided adversely to Ard by this office on the 19th day of November, 1877, and said decision affirmed by the honorable Secretary of the Interior *of* the 8th day of November, 1878, I have to advise that on the 21 ult. the honorable Secretary of the Interior refused to reopen the case. The parties in interest will be advised of
11 this action by this office. A copy of the honorable Secretary's decision is herewith enclosed.

Very respectfully, J. M. ARMSTRONG,
Acting Commissioner."

To all of which evidence the defendant then and there objected as being incompetent, irrelevant, and immaterial; which objections are by the court overruled; to which ruling the defendant then and there duly excepted and still excepts.

The plaintiff now offers in evidence Exhibit "C;" to which the defendant objects as being incompetent, irrelevant, and immaterial. Said Exhibit "C" is in words and figures as follows, to wit:

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June 1st*, 1888.

I, S. M. Stockslager, Commissioner of the General Land Office, do hereby certify that the annexed copy of proofs submitted by Newton L. Ard Sept. 9, 1872, in the matter of his claim to the W. ½ S. E. ¼ sec. 2, t'p 26, R. 20 E., Kansas, is a true and literal exemplification of the original proofs on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

S. STOCKSLAGER,
[SEAL.] *Commissioner of the General Land Office.*"

"NEWTON L. ARD
vs.
M., K. & T. R. R. Co.

U. S. LAND OFFICE,
INDEPENDENCE, KANSAS, *September 9th*, 1872.

In the matter of the application of Newton L. Ard for the W. ½ of the S. E. ¼ sec. 2, town. 26 S., range 20 E., the M., K. & T. R. R. Co. being an adverse claimant for the above-described tract of land,

by virtue of the act of March 3, 1863, and July 26th, 1866, notice was issued August 14th, 1872, from this office and case set for hearing September 9th, 1872, at which time the plaintiff appeared in person and the M., K. & T. R. R. Co. by her attorney, and the plaintiff offers proof in support of his claim as follows, to wit:

Newton L. Ard, of lawful age, after being duly sworn, deposes and says: I am the applicant in this case and the same person who filed for this tract of land, July 14th, 1866, D. S. 2115. I was then a single man, over 21 years of age, and a native-born citizen of the United States. The first improvement I made on this claim was breaking prairie, about the 20th of June, 1866. I broke about two acres. About the first of July, 1866, I broke hedge rows on three sides of it; finished on the 4th of July. The next work done was along in the fall; I rebroke the two acres. The next, I hauled rails in the winter and spring of 1867. I hauled enough to enclose about four acres. Along in the spring of 1867 I built a rail pen, but up to that time had no house built on the land. I lived one-half mile west of my claim. I slept on my claim once in a while from the 20th of June, 1866, until the first of December, 1866. I slept by a pile of rails. In the spring of 1867 I built fence around
12 four acres and broke about two acres more and put it in cultivation. I have continued to improve and have now upon the land 75 acres fenced and under cultivation and a hedge row of 160 rods, growing; orchard set out; dwelling, 13 by 14 feet, one story high; has about 1,000 peach trees growing and part of them bearing; have built a log stable and a log corn-crib, and also dug a well.

NEWTON L. ARD.

Subscribed and sworn to before me this 9th day of September 1872.

P. B. MAXSON, *Register.*

James Ard, of lawful age, after being duly sworn, deposes and says: I am the brother of the applicant. I reside in within a ½ mile of the land in question, and have resided there since the spring of 1866. I have heard the testimony of the preceeding witness read and have personal knowledge that the facts therein contained are substantially correct and true.

JAMES ARD.

Subscribed and sworn to before me this 9th day of September, 1872.

P. B. MAXSON, *Register.*"

To all of which evidence the defendant then and there objected as being incompetent, irrelevant, and immaterial; which objections were by the court overruled; to which ruling the defendant then and there duly excepted and still excepts.

The plaintiff then offered in evidence Exhibit "D;" to which the

defendant objected as being incompetent, irrelevant, and immaterial. Said Exhibit "D" is in words and figures following:

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June*, 1888.

I, T. J. Anderson, acting Commissioner of the General Land Office, do hereby certify that the annexed copy of the opinion of the register and receiver at Independence, Kansas, in the case of Newton L. Ard *vs.* The Missouri, Kansas and Texas Railway Co., involving the W. ½ S. E. ¼ sec. 2, Tp 26 S., R. 20 E., Kansas, is a true and literal exemplification of the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

T. J. ANDERSON,
[SEAL.] *Acting Commissioner of General Land Office.*"

In the matter of the application of Newton L. Ard for W. ½ S. E. ¼ sec. 2, 26 S., 20 E., the M., K. & T. R. R. Co. being adverse claimant to said tract of land, notice of contest was issued at this office and a hearing set for September 9, 1872. Parties appeared and offered, and plaintiff offered proof. The records of this office show that Newton L. Ard filed D. S. 2115 July 14, 1866, alleging settlement same day. From this testimony submitted is shows that said Ard did not fill the law in getting a house on the land within six months after settlement or did not within one year prove up and pay for the land as required by law. The register or receiver of said application should be rejected.

W. W. MARTIN, *Register.*
H. M. WATERS, *Receiver.*

13 To all of which evidence the defendant then and there objected as being incompetent, irrelevant, and immaterial; which objections were by the court overruled; to which ruling the defendant then and there duly excepted and still excepts.

The plaintiff then rested.

"It is agreed that the testimony of the defendant in the case of C. H. Pratt *vs.* N. L. Ard is as follows:

1st. That the defendant, N. L. Ard, is over 42 years of age and a citizen of the United States, and settled on the land described in plaintiff's petition as follows: The W. ½ of S. E. ¼ of section 2 and N. ½ of N. E. ¼ of section 11, all in town. 26, range 20 east; that defendant settled on said land July 14th, 1866. The first work said defendant done on said land was about the last of June, 1866; that he broke about two acres of prairie and three hedge rows on said land, making about five acres in all. Then I went to the U. S. land office at Humboldt, Kansas, which was on the 14th day of July, 1866, and there I made out a homestead application for said land, as described, and tendered the application and the land office fees to the register of the U. S. land office, of which Watson Stewart was reg-

ister of said land office, and at that time I was a single man and over 21 years of age, a citizen of the United States, and had never had the benefit of the homestead or pre-emption laws of the United States, but said register, Watson Stewart, rejected said application and fees, as he claimed, on the ground that said land was situated within the granted limits of the L., L. & G. R. R. and was double minimum lands, and that he could not let me homestead only 80 acres, as the land was double in price. Said register advised me if I wanted said 160 acres that I could first make a pre-emption filing on 80 acres of land and put a house on said land within 12 months and prove up and pay for it at $2.50 per acre, and then I could homestead 80 acres more, and by that plan I could get 160 acres, but said register told me that I could change a pre-emption filing at any time, if I wanted to, into a homestead; so I told said register as he would not allow my homestead, I would make a pre-emption filing on part of the land, as he would not let me only on 80 acres; so he made out the filing and I paid him a fee of $2.00, which he said was the fee; a copy is hereto attached and admitted as in evidence:

"REGISTER'S OFFICE,
HUMBOLDT, KANSAS, *July 14th*, 1866.

No. 2115.

I certify that Newton L. Ard has this day filed in this office his notice to claim by right of pre-emption the west half of the south-east quarter of section No. 2, in township No. 26 S., in range No. 20 east, of the sixth principal meridian, in the State of Kansas. $2.50 per acre, within R. R. limits.

WATSON STEWART, *Register*."

Said words and figures "$2.50 per acre, within R. R. limits" being written in red ink transversely across the face of the certificate.

And in the fall of 1866 I rebroke said land, and in the winter and spring of 1866 and 1867 I hauled rails and fenced about four acres, and about the first of March, 1867, I built a house on said land, and in the spring of 1867 I put about four acres in corn and broke about 20 acres of prairie, and in the fall put in wheat, and in the winter of '67 and spring of '68 I hauled rails and poles
14 and fenced 80 acres of said land, as described, and in the spring of 1868 I put in corn about 4 acres and broke out, with what I had broke, making about 75 acres in all. In the spring of 1867 I heard that all land in Allen county was withdrawn for R. R. purposes. I went to the U. S. land office at Humboldt about the 1st of July, 1867, for the purpose of changing my pre-emption filing into a homestead. Of the register, who was then N. S. Goss, I asked if I could change said filing, as described, into a homestead. Said register told me I could not, as he said all said land was withdrawn for R. R., and when I withdrew my pre-emption filing the land would revert to the R. R. Then I asked the register if I could pay for the land under the pre-emption law, and he told me

I could, provided I had a house on said land within six months from the time I made said filing and was living on said land. I told said register it was about 8 months before I had a house on said land, as I was told by the register, Watson Stewart, so I got a house on said land within 12 months would do. Said register told me I could not prove up and pay for the land, as I did not have a house on said land within six months from the time the filing was made, as said register said that it was the rules of said office, but he advised me to stay on the land, as he thought it would fall outside of the limits of the R. R., and that the R. R. would get land enough without going so far out. I went back home and continued to occupy said land, and in the spring of 1871 I built another house on said land, 12 x 14, one story high, made out of native lumber, covered with shingles—2 floors, 2 doors, and 2 windows. Some time in February, 1872, I went to the U. S. land office and made a further effort to homestead said land as described, but said register refused to receive any fees or grant any homestead papers, giving the reason that the land was withdrawn for R. R. purposes. Said register advised me to stay on said land, as he said from where the R. R. was built I was outside of the granted limits, and he thought the company would get land enough without going so far out from said r'roads; so I have kept constantly improving said land, and have farmed said land continuously each and every year since 1866, and also have occupied the same since that time, and have 80 acres in cultivation, 120 acres fenced with hedge and wire, bearing orchard of peach, cherry, and apple; 2 wells, corn-crib, and stable and other buildings; improvements worth twelve hundred dollars. At the time the railroad company, through whom the plaintiff claims title, appraised this land said appraisers knew and were informed by defendant that he, the defendant, was homesteading said land, and defendant had erected valuable improvements thereon; that the railroad company's appraisers of the land knew at that time that he had 80 acres under fence and 70 acres in cultivation, and ever since the 14th day of July, 1866, the defendant has been in the actual, open, visible, and exclusive possession of the land in controversy. At the time defendant made settlement he was duly competent to make a legal homestead or pre-emption, and has ever since been duly competent and qualified to make a valid homestead entry, and that he still resides on said land with a wife and 6 children, and that he has all the required improvements to perfect a homestead or pre-emption.

It is admitted that the W. ½ of S. E. ¼, sec. 2, 26, 20 E., was
15 selected by the Missouri, Kansas and Texas Railroad Company April 14th, 1873, and it was patented to said company the 3rd day of November, 1873, under the act of Congress of July 26, 1866.

The N. ½ of the N. E. ¼ of sec. 11, 26, 20 E., was selected by both companies jointly—Missouri, Kansas and Texas Railroad Company and L., L. & G. R. R. Co.—August the 8th, 1872. This tract was approved to the State for the M., K. & T. Co. April 10th, 1873, under the act of Congress of March 3rd, 1863. Both tracts *was* selected

as indemnity lands and both tracts are over 12 miles from both roads and lie within the indemnity limits of both the L., L. & G. and M., K. & T. R. R. Said defendant also testified that when said defendant settled on said land he *done* it in good faith and for the sole purpose of making it his homestead.

It is further admitted that under the act of Congress on July 26th, 1866, the company did not file map of definite location until December 6th, 1866. It is further agreed that in case the plaintiffs are entitled to recover in the said cases that the judgment for use and occupation in said cases shall be as follows: In Pratt *vs.* Ard, $50.00 per annum; in Branden *vs.* Ard, $25.00 per annum and costs.

It is further agreed by and between the parties to this action that the land in controversy is covered by the letters of withdrawal, marked "B" and "C" respectively, on pages 58 and 59 of the 27th Kansas Report, which are to be considered as part of the evidence.

The defendant makes no objection on account of absence of original letters of withdrawal, but objects to this evidence as being incompetent, irrelevant, and immaterial—conveys no title; said letters and pretended withdrawal are void and in derogation of the act of Congress of the United States of America.

The above and foregoing is a true and correct copy of the agreed statement of facts between the parties to this action and a true and correct statement of all agreements made in open court by parties hereto, and is a true and correct statement of all the evidence introduced in the case.

16 There being no further evidence, the court took the case under advisement; and afterwards, to wit, on the 17th day of June, 1889, it being the June, 1889, term of said court, the court rendered judgment in said action against defendant and in favor of said plaintiff; to which order and judgment the defendant then and there duly excepted and still excepts.

A copy of the journal entry of said judgment is in words and figures as follows, to wit:

"C. H. Pratt)
vs.) No. 2429.
N. L. Ard.)

This cause having been under advisement, whereupon the court proceeds to render judgment. The court thereupon finds for the plaintiff, that he recover of and from defendant the land in controversy and $300.00 damages, and costs of suit, taxed at $—.

It is therefore considered, ordered, and adjudged that the plaintiff have and recover the possession of and from the defendant, N. L. Ard, the defendant herein, the land in controversy described in the answer of said defendant, to wit:

The west half of the southeast quarter of section two, township twenty-six, range twenty, in Allen county, Kansas.

It is further ordered and adjudged that plaintiff have and recover of the defendant the sum of $300.00, his damages sustained for the wrongful detention of said land, and for costs of suit, taxed at $—.

And this cause comes on further to be heard upon the motion of the defendant for a new trial, which motion is by the court overruled; to which ruling and order the defendant then and there duly excepted and still excepts; and for good cause shown defendant is given forty days to make a case for the Supreme Court, and plaintiff is given five days to suggest amendments, and the case to be settled in ten days thereafter on 5 days' notice; amount of supersedeas bond fixed at $400, and a stay of execution granted for sixty days."

To each and all of said orders, judgments, and decrees the defendant then and there duly excepted and still excepts.

On said 17th day of June, 1889, said defendant, N. L. Ard, filed in said court his motion for a new trial; which motion is in words and figures following, to wit:

In the District Court of Allen County, Kansas.

C. H. PRATT, Plaintiff,
vs.
N. L. ARD, THOS. MALEY, FRED. NELSON, *et al.*, Defendants.

Motion for New Trial.

Now comes the said defendant, N. L. Ard, and moves the court to vacate and set aside the decision and judgment of the court heretofore rendered in this action and grant a new trial for causes affecting materially the substantial right of the defendant in this action; which causes are as follows, to wit:

1st. Irregularity in the proceedings of the court, by which
17 the defendant was prevented from having a fair trial.

2. Abuse of discretion by the court, by which the defendant was prevented from having a fair trial.

3. Irregularity of the prevailing party, by which the defendant was prevented from having a fair trial.

4. Misconduct of the prevailing party.

5. Error in the assessment of the amount of recovery, the amount thereof being too large.

6. That the decision is not sustained by sufficient evidence.

7. That the decision is contrary to law.

8. Errors of law occurring at the trial and excepted to by the defendant at the time.

BENTON & SCOTT AND H. A. CAMPBELL,
Attorneys for Defendant, N. L. Ard.

And on said 17th day of June, 1889, this cause came on further to be heard upon the motion of defendant, N. L. Ard, for a new trial; which motion was by the court overruled; to which ruling of the court the said defendant, N. L. Ard, then and there duly excepted and still excepts. And thereupon, for good cause shown, said defendant, N. L. Ard, was given forty days to make a case for the Supreme Court, and plaintiff given five days to suggest amendments thereto, and the case to be settled in ten days thereafter, on five days' notice.

And afterwards, to wit, on the 19th day of July, 1889, the court made an order in said case; which order is in words and figures as follows:

"In the District Court of Allen County, Kansas.

C. H. PRATT, Plaintiff,
vs.
N. L. ARD, Defendant.

Upon application, and for good cause shown, the time for making a case in this action for the Supreme Court is hereby extended ten days, upon the same terms with regard to suggesting amendments, settling, and notice as provided for in the original order.

Done at Erie, Kansas, this 19th day of July, 1889.

L. STILLWELL,
Judge District Court."

On the back of said order appears the following, to wit: "Filed July 24, 1889. M. P. Jacoby, clerk."

The foregoing contains a true and correct statement of all the pleadings, motions, orders, evidence, findings, and proceedings upon which judgment was rendered.

18 STATE OF KANSAS, } ss:
Allen County, }

This is to certify that the above — foregoing case made and amendments thereto have been duly served in due time and the amendments thereto duly suggested and the same duly submitted to me for settlement and signing, as required by law, by the parties to said cause; that the same, as above set forth and as corrected by me, is true and correct and contains a true and correct statement of all the pleadings, motions, orders, evidence, findings, proceedings, and judgments had in such cause, and I hereby settle, allow, certify, and sign the same as true and corfect, and hereby order that the clerk of the district court attest the same with the name and seal of said court and file the same of record as provided by law.

Witness my hand, at Iola, Kansas, this 6th day of August, 1889.

L. STILLWELL,
Judge District Court.

Attest:
[SEAL.] M. P. JACOBY, *Clerk.*
Aug. 6, 1889.

I assent to signing of the above without notice.

L. W. KEPLINGER.

Filed August 6th, 1889.

M. P. JACOBY,
Clerk District Court.

Filed August 20, 1889.

C. J. BROWN,
Clerk Supreme Court.

19 And also, on the 25th day of October, 1889, there was filed in the office of the clerk of the supreme court of the State of Kansas a waiver of the issuance and service of summons in error in this cause, which is in the words and figures as follows, to wit:

20 In the Supreme Court of the State of Kansas.

NEWTON L. ARD, Plaintiff in Error,
vs.
ALEX. BRANDEN, Defendant in Error.

N. L. ARD, Plaintiff in Error,
vs.
C. H. PRATT, Def't in Error.

MARY E. WOOD, Plaintiff in Error,
vs.
J. M. BEACH, Defendant in Error.

Waiver of Issuance and Service of Summons.

I, the undersigned, attorney for all of the above-named defendants in error, hereby waive the issuing and service of a summons in error in each of the above-entitled cases and enter an appearance for each of the above-named defendants in error in each of said cases.

L. W. KEPLINGER,
Attorney for Alex. Branden, Def't in Error; C. H. Pratt, Defendant in Error; J. M. Beach, Defendant in Error.

6128. Newton L. Ard *vs.* Alex. Branden. Waiver.

Filed October 25th, 1889.

C. J. BROWN,
Clerk Supreme Court.

21 And afterwards, on the 6th day of March, 1890, the same being one of the regular judicial days of the January term, 1890, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable Daniel M. Valentine and Honorable William A. Johnston, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

N. L. ARD, Plaintiff in Error,
vs.
C. H. PRATT, Defendant in Error.

This cause comes on to be heard on the petition in error and the transcript of the record of the district court of Allen county, and also comes on to be heard the motion of the defendant in error to affirm the judgment of the court below for the reasons set out in said written motion on file; and thereupon it is ordered that the

said motion to affirm be overruled, and the said cause was submitted on the brief of plaintiff in error and taken under advisement by the court. The plaintiff in error is allowed ten days within which to file additional brief, and defendant in error is allowed 20 days from this date within which to file brief.

22 And afterwards, on the 4th day of April, 1890, the same being one of the regular judicial days of the January term, 1890, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable Daniel M. Valentine and Honorable William A. Johnston, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

N. L. ARD, Plaintiff in Error,
vs.
C. H. PRATT, Defendant in Error.

This cause comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be affirmed.

It is further ordered that the plaintiff in error pay the costs of this case in this court, taxed at $—, and hereof let execution issue.

23 And also, on the said 4th day of April, 1890, there was filed in the office of the clerk of the supreme court of the State of Kansas the syllabus and opinion of the court in said cause, which are in the words and figures as follows, to wit:

24 N. L. ARD
vs.
C. H. PRATT. } No. 6129.

Error from Allen county. Affirmed.

Syllabus. By the Court—Horton, C. J.

1. The officers of the Land Department are especially designated by law to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands with a view to secure rights of pre-emption, and for mere errors of judgment, upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department, and perhaps, under special circumstances, to the President.
2. Where a person comes to a United States local land office intending to homestead one hundred and sixty acres of land and makes his application and tenders the fees therefor, but is informed by the register that his land is situated within the granted limits of a railroad company, and that he can homestead only eighty acres, and, acting upon this advice, utterly abandons the intention of taking a homestead and makes a pre-emption filing upon eighty acres of the land, he must sub-

sequently show a compliance with the requirements of the pre-emption law to prove up and make payment on the eighty acres.

3. Where a person having the qualifications of a pre-emptor attempts to secure title to a tract of land under the pre-emption law by filing thereon and his pre-emption filing is subsequently cancelled on account of his non-compliance with the provisions of the statute and the regulations of the United States Land Department concerning residence and improvements, he cannot afterwards claim the land as a settler under the homestead law if an adverse claimant has in the meantime intervened and obtained a legal right thereto.

All the justices concurring.

A true copy.

Attest:

____ ____,

Clerk Supreme Court.

25

N. L. ARD
vs.
C. H. PRATT. } No. 6129.

Error from Allen county. Affirmed.

The opinion of the court was delivered by HORTON, *C. J.*:

This was an action brought by C. H. Pratt against N. L. Ard to recover the possession of the west half of the southeast quarter of section two, township twenty-six, range twenty, in Allen county.

The case was tried by the court without a jury. The trial court found for the plaintiff, and the defendant brings the case here.

A patent for the land was issued on the 3rd day of November, 1873, to the Missouri, Kansas and Texas Railroad Company. It is conceded that whatever title to the land passed by the patent to the railroad company is in Pratt by virtue of a conveyance from the company to him.

Ard claimed an equitable title to the land and possession thereof under the provisions of the land laws of the United States.

It appears from the record that Ard went upon the land in controversy, and also the north half of the northeast quarter of section eleven, township twenty-six, range twenty, the last of June, 1866. He broke two acres of prairie and three hedge rows on the land. He went to the United States land office at Humboldt, in this State, on the 14th day of July, 1866, to make a homestead application and tendered the fees therefor to the register. At that time he was a single person, over forty-two years of age, a citizen of the United States, and had never had the benefit of the homestead or pre-
emption laws. Watson Stewart, the register, informed him
26 that the land was situated within the granted limits of the Leavenworth, Lawrence and Galveston railroad, and that he could only homestead eighty acres. The register also advised him that he could make a pre-emption filing on eighty acres of the land and build a house thereon, and then prove up and pay for it at

$2.50 per acre; that afterwards he could homestead eighty acres more, and by that plan obtain one hundred and sixty acres.

As the register would not allow Ard to homestead one hundred and sixty acres, he made a pre-emption filing on the eighty acres in dispute.

In the fall of 1866 he rebroke two acres of the land, hauled rails in the winter of 1867, and in the spring of that year built a rail pen on the land. Up to that time he had no house on the land, but lived a half mile west, sleeping upon it once in a while by a pile of rails.

About the 1st of July, 1867, he went to the local land office for the purpose of changing his pre-emption filing into a homestead. The register, N. S. Goss, told him he could not make the change, as all of the land had been withdrawn for the railroad, and that if he should change his pre-emption filing the land would revert to the railroad. He then asked the register if he could pay for the land under the pre-emption law. The register said to him he could pre-empt if he had a house on the land within within six months from the time of making his filing and was living on the land. He informed the register that it was about eight months before he had erected a house on the land, and the register replied,
"He could not prove up and pay for the land, as he had not
27 complied with the law." He applied to the local land office to make proof and payment on August 9th, 1872.

A hearing was ordered by the local officers and the case set for the 9th of September, 1872, and when it was heard both he and the railroad company appeared. The application of Ard was rejected by the local land officers and the U. S. Land Commissioner. He appealed to the Secretary of the Interior. The Secretary on November 5th, 1878, affirmed the decision of the Commissioner of the Land Office.

It is admitted that said section two was selected by the Missouri, Kansas and Texas Railroad Company as indemnity land on April 14th, 1873; that it was patented to the Missouri, Kansas and Texas Railroad Company on the 3rd day of November, 1873; that the land is over twelve miles from the Missouri, Kansas and Texas and the Leavenworth, Lawrence and Galveston railroads; that it was patented to the Missouri, Kansas and Texas Railroad Company on the 3rd day of November, 1873; that the railroad company filed a map for a definite location of its road on December 6th, 1866; that the land is covered by the letters of withdrawal of the *the* United States Land Commissioner of March 19th, 1867, and April 30th, 1867, marked B and C, in case of Neer *vs.* Williams, 27 Kas. Rep., pages 58 and 59. The patent issued to the railroad company, and under which Pratt claims, must be regarded as valid and sufficient to convey the land, unless the facts of this case clearly show that the defendant is entitled to the particular tract in dispute under
the land laws of the United States. Railroad Co. *vs.* Attor-
28 ney General, 118 U. S., 82; Brewster *vs.* Railroad Co., 25 Fed. Rep., 243; United States *vs.* Railroad Co., 37 Fed. Rep., 68; Burnham *vs.* Starkey, 41 Kas., 604.

To overcome the title conveyed by the patent Ard must have shown that the land was not only subject to pre-emption or homestead, but that he had fully complied with all the requirements of either the homestead or the pre-emption law. Upon the hearing or contest over the land, had before the local land officers on September 9th, 1872, the decision upon the facts of the case was against Ard. It was then determined that he had not complied with the provisions of the pre-emption law.

The U. S. Land Commissioner, under the date of November 19th, 1877, after an examination of the evidence transmitted to him by the local land officers, wrote them as follows: "It does not appear just when Ard first had a dwelling-house or took up his actual residence on the land. It is clear, however, that he did not, within the time prescribed by the pre-emption law, make proof and payment, nor does it appear that he attempted to do so. I am of opinion that from his own admissions Ard did not, at the date the right of the road attached, have such a valid subsisting claim as would have been capable of being perfected into complete title or would have excepted the land from the grant to the company. Ard's application to make proof and payment is therefore rejected, and the title of the company, under its patent, will not be disturbed."

The general rule is that the decision of the United States land officers upon controverted questions of fact, in the absence
29 of fraud, imposition, or mistake, is conclusive. Johnson *vs.* Towsley, 13 Wall., 86; Shepley *vs.* Cowan, 91 U. S., 330. If those officers misconstrue or misinterpret the law, their decision is subject to review and reversal, as the courts in such cases give relief.

It is unnecessary, upon the question of pre-emption, to determine whether the withdrawals of the land on March 19th, 1867, and April 30th, 1867, by the Department of the Interior were valid or not. Upon the failure of Ard to comply with the pre-emption law his right under his pre-emption filing ceased, and so far as his pre-emption was concerned, the land reverted to the United States or to the railroad company. Afterwards the United States conveyed its title to the railroad company and the company to Pratt. Therefore Ard has not shown upon the facts that he is entitled in law or in equity to the tract in dispute by reason of his pre-emption filing.

It was said in United States *vs.* Railway Co., *supra*, by Brewer, J.: "The observations of the Supreme Court admonish me that a patent once issued from the General Government is not lightly to be disturbed, and that the perfect title supposed to be conveyed thereby must always be upheld unless it be manifest that there has been in its issue a clear departure from the authority granted. If this be true in respect to a recent patent, much more it is true in reference to a patent so old as this."

We next come to Ard's claim under the homestead law.

When he made his pre-emption filing on the 14th of July,
30 1866, he accepted the advice of the register of the land office and utterly abandoned his intention of homesteading. If the withdrawals of the land from private entry in 1867 were sufficient to defeat a settlement for the purpose of a homestead while the

order was in force, even if improperly issued, then Ard obtained nothing under his homestead claim, because he abandoned that claim on the 14th of July, 1866. Wolsey *vs.* Chapman, 101 U. S., 755. If the withdrawals of the land in 1867 were without authority of law and not sufficient to defeat a homestead settlement, yet Ard can make no claim under the homestead law, because it was too late to initiate any homestead right after his pre-emption filing had failed. The land had been then legally selected by the railroad company. An adverse claimant had intervened and obtained rights.

In whatever view we may consider the case, it does not appear that Ard so complied with either the pre-emption or homestead law as to obtain any legal or equitable claim to the land conveyed by the patent.

It is urged that, as the officers of the local land office in their conversations with Ard gave him advice upon which he acted, he has rights and equities which are paramount to the patent title. Patents from the United States ought not to be brushed easily away upon oral conversations between claimants and the United States land officers.

"Parties place faith and should place faith in the action of the Government and rely upon the title which its patent conveys." United States *vs.* Railroad Co., *supra*. The local land officers
31 had no authority or power to dispose of the land otherwise than in accordance with the laws of the United States and regulations of the General Land Office. If Ard accepted voluntarily the advice given he cannot complain; if he did not wish to accept the rulings of the local land officers he should have appealed from any objectionable order. Burnham *vs.* Starkey, *supra*.

Finally, it is requested that, if there is any doubt as to Ard's equitable title to the land, this case be continued to await the decision of the Supreme Court of the United States in the case of The United States *vs.* The Railway Company, involving the validity of the patent. That case antedates this.

The final decision in this case does not rest with us. This case is simply passing through this court on its way to the Supreme Court of the United States.

We do not think that the final decision by the Supreme Court of the United States should be delayed by the refusal of this court to pass upon the law questions presented.

The land troubles in Allen county are of so serious a nature that all legal questions involved in this and similar cases should be finally disposed of as speedily as possible.

In our opinion, Pratt has the legal title and is entitled to possession of the land under the acts of Congress referred to in the letters of withdrawals and the patent of November 3rd, 1873. It is also our opinion that Ard has not brought himself within any provisions of the acts of Congress relating to the public lands so as to hold possession or to give him any legal or equitable title to the land as a homesteader or pre-emptor.

The judgment of the district court will be affirmed.
All the justices concurring.

A true copy.
Attest:

____ ____,
Clerk Supreme Court.

32 6129.

And afterwards, on the 22nd day of April, 1890, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition for the writ of error; which is in the words and figures as follows, to wit:

The United States of America to the honorable the chief justice of the State of Kansas:

Your petitioner, N. L. Ard, respectfully shows that on the 4th day of April, 1890, the supreme court of the State of Kansas rendered a final judgment against your petitioner in a certain cause wherein N. L. Ard was plaintiff in error and C. H. Pratt was defendant in error, affirming *the* favor of the said C. H. Pratt and against your petitioner, a judgment in the district court of Allen county, Kansas, for the recovery and possession of certain land, to wit, the west half ($\frac{1}{2}$) of the southeast quarter ($\frac{1}{4}$) of section two (2), township 26, range 20, in Allen county, Kansas, as will appear by referring to the record and proceedings in said cause, and that said supreme court of the State of Kansas is the highest court in said State in which a decision of the said suit could be had, and your petitioner claims a right to remove said judgment and proceedings to the Supreme Court of the United States by a writ of error, under section 709 of the Revised Statutes of the United States, because in said suit your petitioner claims his rights to the land in dispute under and — virtue of the laws of Congress in relation to homestead and pre-emptions and the rulings and decisions of the proper officers thereunder, which rights have been decided against your petitioner in said supreme court of the State of Kansas in said cause; and your petitioner further alleges that the judgment aforesaid is against his rights, as shown by said record, guaranteed
33 to him by section 5 of the act of Congress approved March 3rd, 1887 (entitled An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes); and your petitioner further shows that the issue and question involved in the trial of said cause are Federal in their nature and fall more particularly within the provision of the Federal courts and the proper officers of the Government of the United States.

Wherefore your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States, and for a citation.

WM. LAWRENCE,
A. L. ALLEN,
Attorneys for Petitioner.

Let the writ of error issue upon the petitioner, N. L. Ard, entering into an undertaking to the said C. H. Pratt in the sum of $400.00, conditioned as by law in such cases made and provided.

ALBERT H. HORTON,
Chief Justice.

N. L. Ard *vs.* C. H. Pratt. Petition for writ of error.
Filed April 22, 1890.

C. J. BROWN,
Clerk Supreme Court.

34 And afterwards, on the 23rd day of July, 1890, there was filed in the office of the clerk of the supreme court of the State of Kansas an appeal bond herein, which, with all of the endorsements thereon, is in the words and figures as follows, to wit:

Know all men by these presents that we, N. L. Ard, as principal, and John Ard, David Ard, Eliza Jane Ritter, Anton Bauer, J. H. Wood, Aron Hibbs, William Hoil, sureties, are held and firmly bound unto C. H. Pratt in the sum of four hundred dollars ($400), to be paid to the said C. H. Pratt, his attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2d day of June, in the year of our Lord 1890.

Whereas lately, at a term of the supreme court of the State of Kansas, in a suit pending in said court between N. L. Ard, plaintiff in error, and C. H. Pratt, defendant in error, judgment was rendered against said N. L. Ard, and the said N. L. Ard having obtained a writ of error to the Supreme Court of the United States and filed a copy thereof in the clerk's office of the said supreme court of the State of Kansas to reverse the judgment in the aforesaid suit, and a citation directed to the said C. H. Pratt, citing and admonishing him to be and appear at the Supreme Court of the United States, to be holden at Washington the second Monday in October next:

Now, the condition of the above obligation is such that if the said N. L. Ard shall prosecute his said writ of error to *the* effect and answer all damages and costs if *they* fail to make good *their* plea, then the above obligation to be void; else to remain in full force and effect.

N. L. ARD. [SEAL.]
JOHN ARD. [SEAL.]
DAVID ARD. [SEAL.]
35 ELIZA JANE RITTER. [SEAL.]
ANTON BAUER. [SEAL.]
[SEAL.] J. H. WOOD.
his
ARON x HIBBS. [SEAL.]
mark.
WILLIAM HAIL. [SEAL.]

STATE OF KANSAS, } ss:
Allen County, }

Anton Bauer, being duly sworn, says:

He is one of the sureties of the within bond; that he is the owner of one hundred and sixty acres of land in said county clear and free of all incumbrances, fourteen head of horses, forty-five head of cattle, twenty-five head of hogs, one hundred acres of growing crop clear and free from all incumbrances, and that said live stock is of the value of at least twenty-five hundred dollars, and that said affiant is worth at least twenty-five hundred dollars over and above all exemptions and liabilities.

ANTON BAUER.

Sworn to before me and subscribed in my presence this 16th day of June, 1890.

L. B. MURRAY, *J. P.*

The above and foregoing bond approved by me this 23rd day of July, 1890.

ALBERT H. HORTON,
Chief Justice of the Supreme Court of Kansas.

6129. N. L. Ard *vs.* C. H. Pratt. Appeal bond.
Filed July 23, 1890.

C. J. BROWN,
Clerk Supreme Court.

36 And afterwards, on the 20th day of November, 1890, there was filed in the office of the clerk of the supreme court of the State of Kansas a writ of error in the above-entitled cause, which is in the words and figures as follows, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the supreme court of the State of Kansas, before you, between N. L. Ard, plaintiff in error, and C. H. Pratt, defendant in error, a manifest error hath happened, to the great damage of the said N. L. Ard, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do *de*mand you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what *if* right and according to the laws and customs of the United States should be done.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

Witness the Honorable Melville Fuller, Chief Justice of the Supreme Court of the United States of America, this 20th day of November, A. D. 1890.

G. F. SHARITT, *Clerk.*

Allowed.

37 6129.

And afterwards, on the 31st day of December, 1890, there was filed in the office of the clerk of the supreme court of the State of Kansas a citation in the above-entitled cause, the original of which, with the endorsements thereon, is in the words and figures as follows, to wit:

Citation.

THE UNITED STATES OF AMERICA, *ss:*

To C. H. Pratt or his attorney of record, L. W. Keplinger, Greeting

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden in the city of Washington on the — day of ——, pursuant to the writ of error filed in the clerk's office of the supreme court of the State of Kansas in a certain action wherein N. L. Ard is plaintiff in error and C. H. Pratt is defendant in error, to show cause, if any there be, and if the judgment in said writ of error mentioned shall not be corrected and speedy justice should not be had in that behalf.

Witness the Hon. Albert H. Horton, Chief Justice of the State of Kansas, this 23d day of December, 1890.

ALBERT H. HORTON,
Chief Justice of Supreme Court of Kansas.

I hereby acknowledge receipt of copy of above this 31 of Dec., 1890.

L. W. KEPLINGER,
Att'y for C. H. Pratt.

38 In the Supreme Court of the State of Kansas.

I, C. J. Brown, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, correct, and complete transcript of all pleadings and papers filed and of all proceedings had in the above-entitled cause as the same remain on file and of record in my office.

Seal Supreme Court, State of Kansas.

Witness my hand and the seal of the supreme court of the State of Kansas, affixed hereto, at my office, in the city of Topeka, this 18th day of March, 1891.

C. J. BROWN,
Clerk Supreme Court.

Endorsed on cover: Case No. 14,600. Kansas sup. court. No. 142. N. L. Ard, plaintiff in error, *vs.* C. H. Pratt. Filed April 27, 1891.